ADT, LLC *and* Communications Workers of America, AFL–CIO. Cases 16–CA–144548, 16–CA–168863, 16–CA–172713, 16–CA–179506, 16–CA–180805, 16–CA–181198, 16–CA–187497, 16–CA–191963, 16–CA–199947, 16–CA–200961, 16–CA–209070, and 16–CA–209995

November 22, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On November 16, 2018, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union filed answering briefs, and the Respondent filed a reply brief. The General Counsel filed limited exceptions and a supporting brief, and the Respondent and the Union filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] only to the extent consistent with this Decision and Order.[4]

Facts

The Respondent sells, installs, and services security systems in the Dallas-Fort Worth, Texas area. The Union had represented a unit of servicemen at the Respondent's facilities since 1978.

In 2010, the Respondent acquired Brinks Home Security Holdings, Inc., a company employing nonunion servicemen in the Dallas-Fort Worth area who performed the same work as the Respondent's unit servicemen. At the time of the acquisition, the former Brinks servicemen and the unit servicemen worked at separate facilities. The former Brinks servicemen have outnumbered the unit employees since approximately the time of the acquisition. The Union did not seek to represent the former Brinks servicemen, and the Respondent and the Union have never applied the collective-bargaining agreement to them. Over the next few years the Respondent hired more servicemen, placing some in the unit and others in the nonunit group with the former Brinks employees.[5]

In February 2014, the Respondent reorganized its operations by closing the Brinks facilities, establishing new facility locations, and consolidating unit and nonunit servicemen at three of its four facilities.[6] The Respondent continued to place some new hires in the unit and others

[1] In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by "[i]nviting" employees who complained about their terms of employment to quit. We also adopt, in the absence of exceptions, the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) by refusing to provide information to the Union in response to its November 19, 2015 information request.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We have amended the judge's conclusions of law and remedy and modified the judge's recommended Order consistent with our findings herein and to conform to the Board's standard remedial language. We shall further modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall substitute a new notice to conform to the Order as modified.

[4] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) when its supervisor erroneously told employees that they would not receive raises because of the union contract, we note that the Respondent's exception is limited to challenging the judge's credibility determinations. In the absence of any argument that the credited testimony fails to establish an unlawful threat, we adopt the judge's finding of the violation. Further, we do not rely on the adverse inference the judge drew from the Respondent's failure to call the supervisor as a witness.

In adopting the judge's finding under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that the Respondent violated Sec. 8(a)(3) and (1) by suspending and discharging Union Steward Arthur Whittington, we do not adopt the entirety of his analysis. In finding that the General Counsel has established the requisite animus, we rely on the fact that there are no exceptions to the judge's finding that, at two staff meetings during which employees complained about their terms and conditions of employment, managers unlawfully "[i]nvit[ed]" complaining employees to quit "in response to their activities on behalf of the Union and exercise of protected concerted activities." Whittington, in his capacity as a union steward, was among those who complained. As discussed below, however, we find that the Respondent's withdrawal of recognition from the Union was lawful, and therefore we do not rely on the withdrawal of recognition as evidence of animus. Turning to the Respondent's *Wright Line* burden, the Respondent suspended and discharged Whittington, assertedly for timecard inaccuracies. In contrast, however, the Respondent had only issued warnings to several other employees who engaged in similar or more egregious conduct, such as "[f]raud [or] falsification of Company records" (Jose Perez and Telesforo Aviles); "knowingly" entering false timecards (Rob Casteel); entering inaccurate timecards (Jesus Hernandez, Chad Short, and Blaine Hancock); and failing to complete timecards (Glen Rodriguez). Further, the Respondent only discovered certain other employees' timecard inaccuracies in an admittedly "random" investigation after reviewing Whittington's timecards, indicating that this was not a matter it consistently policed. The Respondent has offered no explanation for its disparate treatment of Whittington. We do not rely on the other factors cited by the judge in finding that the Respondent failed to show that it would have taken the same action against Whittington in the absence of his union activity.

[5] Although the record does not establish how many new hires the Respondent placed in the Brinks group, none of the Respondent's placements prior to September 2014 is alleged to be unlawful.

[6] Only unit servicemen work at the fourth facility.

in the nonunit group. At the time of the consolidation, there were 78 nonunit employees and 57 unit employees.[7] As the judge explained in his decision, all employees at the three facilities performed the same work under equivalent working conditions in a fully integrated operation.[8]

In March 2014, the Respondent filed an RM election petition challenging the continued majority support of the Union and seeking an election in a unit consisting of all Dallas-Fort Worth area servicemen. The Region held an election and impounded the ballots pending the Union's request for review.

Since September 2014, the Respondent has placed all new hires in the nonunit group without providing the Union notice and an opportunity to bargain. By the end of September 2014, there were 97 nonunit employees and 57 unit employees in the consolidated work force. The Respondent continued to recognize the Union as representing only the employees historically in the unit. This recognition continued for the 3 years that the Respondent's election petition was pending before the Board.

In May 2017, a Board majority dismissed the Respondent's petition. The Board found no question concerning representation in the Dallas-Fort Worth area unit because the Union had not demanded recognition of the nonunit employees and because the Respondent failed to demonstrate a reasonable good-faith uncertainty regarding the Union's majority status in the historic unit. See *ADT, LLC*, 365 NLRB No. 77, slip op. at 3–6 (2017), motion for reconsideration denied 2017 WL 2714926 (2017). The Board found it unnecessary to pass on whether the unit was no longer appropriate for bargaining due to the Respondent's consolidation of the unit and nonunit groups, whether the nonunit employees should be accreted into the unit, and whether the Respondent could have lawfully withdrawn recognition. Id. at 4–5 & fn. 15.[9] Two weeks after the Board issued its decision, the Respondent withdrew its recognition of the Union. The Union filed several charges supporting the instant complaint before and after the Respondent withdrew recognition. At the time that the Respondent withdrew recognition, the work force complement consisted of 152 nonunit employees and 51 unit employees.

Discussion

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act in four ways. First, the judge found that, because the former Brinks employees no longer had a distinct identity as a group, the unit and nonunit employees were fully integrated as a single work force, and the nonunit servicemen should be accreted into the unit. The judge found that, had the Respondent included new hires in the unit, the unit servicemen would have formed the majority of servicemen in the Dallas-Fort Worth area. Because the parties' collective-bargaining agreement covered all servicemen in the Dallas-Fort Worth area, the judge found that the Respondent violated Section 8(a)(5) and (1) by refusing to place new hires into the unit, beginning in September 2014. Second, the judge found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition of the Union in May 2017. Third, he found that the Respondent violated Section 8(a)(5) and (1) by making several unilateral changes to the unit employees' terms and conditions of employment, and fourth, he found that it violated Section 8(a)(5) and (1) by refusing to provide, and delaying in providing, requested relevant information to the Union.[10]

For the following reasons, we reverse the judge's findings that the Respondent violated Section 8(a)(5). The Board has explained that an employer's consolidation of an unrepresented group of employees with an equal- or smaller-size represented group removes any basis for accreting the former into the latter. See *Nott Co.*, 345 NLRB 396, 400 (2005). Where the groups of employees are fully integrated and have lost their distinct identity as a group, the employer is no longer obligated to recognize or bargain with the union as the representative of employees in the historic unit. Id.; see also *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1338–1340 (1988); *Abbott-Northwestern Hospital*, 274 NLRB 1063, 1064 (1985). To hold otherwise would mean that a minority of members in a workplace group have essentially compelled the majority of employees, who are unrepresented, to be included in a bargaining unit without allowing them the opportunity to express their preference through an election. *Nott Co.*, 345 NLRB at 400; see also *Teamsters Local 206*, 368 NLRB No. 15, slip op. at 1 fn. 3 (2019) ("Where, as here, a question concerning representation has been raised because the wholesale addition of a new group of employees has substantially changed the nature of an extant unit, the Board has held that 'there can be no accretion . . . and no attendant duty to bargain' with a previous representative of

[7] We note that the chart in Sec. II(A) of the judge's decision ("Background") incorrectly represents that the Respondent's reorganization and consolidation took place in September 2014.

[8] There are no allegations that the consolidation of the work force was unlawful.

[9] These matters were not before the Board at the time, although they are at issue here and we discuss them below.

[10] Specifically, the judge found that the Respondent unlawfully unilaterally changed its policies regarding sick leave, lunchbreaks, paid leave banks, bereavement leave, sales quotas, and pay periods; stopped processing grievances; discontinued dues checkoff; unlawfully refused to provide the Union requested relevant information regarding subcontracting and various grievances and disciplines; and unlawfully delayed the provision of requested relevant information regarding new hires.

a portion of the resultant employee complement.") (citation omitted).

Based on the judge's finding that the unit and nonunit employees were fully integrated into a single work force, with which we agree, we find that the former servicemen unit lost its separate identity as a unit appropriate for bargaining as a result of the Respondent's February 2014 work force consolidation. The consolidation occurred before any of the alleged unfair labor practices took place. At all times after the consolidation, the Dallas-Fort Worth area employees were fully integrated, and nonunit employees outnumbered unit employees.[11] Once the former servicemen unit lost its separate identity and was no longer appropriate for bargaining, the Respondent was no longer obligated to recognize and bargain with the Union. See, e.g., *Nott Co.*, 345 NLRB at 400. Accordingly, the Respondent had no duty to recognize the Union or to place new hires in the unit, and the allegations that the Respondent unlawfully failed to do so must be dismissed.[12] Similarly, the allegations that the Respondent made unlawful unilateral changes and refused to provide, and delayed in providing, requested information also relate to actions it took after the consolidation had eliminated its bargaining obligation. Accordingly, we dismiss those allegations as well.

AMENDED CONCLUSIONS OF LAW

Delete the Administrative Law Judge's Conclusions of Law 3 and 6 and renumber the remaining paragraphs.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging Arthur Whittington because Whittington engaged in union activities, we shall order the Respondent to reinstate Whittington and make him whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate Whittington for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above. In addition, we shall order the Respondent to compensate Whittington for any adverse tax consequences of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 16 allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Respondent shall also be required to remove from its files any reference to the unlawful suspension and discharge of Whittington and to notify him in writing that this has been done and that the unlawful suspension and discharge will not be used against him in any way.

ORDER

The Respondent, ADT, LLC, Dallas-Fort Worth, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge employees in response to their activities on behalf of the Communications Workers of America, AFL–CIO (the Union) or their other protected concerted activities.

(b) Threatening employees that wage raises would be withheld in an effort to discourage their support for the Union.

(c) Suspending, discharging, or otherwise discriminating against employees because they engage in union or other protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Arthur Whittington full reinstatement to his former job or,

[11] The judge found, and we agree, that nonunit and unit employees share a community of interests. We note that the sole community-of-interest factor that weighs toward a finding that the unit remained appropriate is the unit's prior bargaining history. However, that is insufficient to retain a separate identity in light of the "full operational and administrative integration" of the Respondent's Dallas-Fort Worth area work force. See *Geo. V. Hamilton*, 289 NLRB at 1340.

[12] That the Respondent did not withdraw recognition until May 2017 does not affect our result. The complaint alleges violations of Sec. 8(a)(5), which are premised on a statutory duty to bargain. While the Respondent waited for the Board to process its RM petition and tally the impounded ballots, it pragmatically continued to recognize the Union. After the Board issued its decision dismissing the petition, the Respondent promptly withdrew recognition on the basis that its lawful consolidation of the work force had eliminated its bargaining obligation. Accordingly, the Respondent did not forfeit its right to withdraw recognition by failing to do so immediately after the consolidation. See, e.g., *Abbott-Northwestern Hospital*, 274 NLRB at 1063 (finding that after the merger the employer applied the collective-bargaining agreement for 9 months and then lawfully withdrew recognition).

if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Arthur Whittington whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the amended remedy section of this decision.

(c) Compensate Arthur Whittington for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Arthur Whittington, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful suspension and discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in the Dallas-Fort Worth, Texas area, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 22, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to discharge you in response to your activities on behalf of the Communications Workers of America, AFL–CIO (the Union) or your other protected concerted activities.

WE WILL NOT threaten to withhold wage raises from you in an effort to discourage your support for the Union.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT suspend, discharge, or otherwise discriminate against you because you engage in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Arthur Whittington full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Arthur Whittington whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Arthur Whittington for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Arthur Whittington, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

ADT, LLC

The Board's decision can be found at www.nlrb.gov/case/16-CA-144548 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Art Laurel and *Maxie Gallardo, Esqs.,* for the General Counsel.
Jeremy Moritz and *Norma Manjarrez, Esqs. (Ogletree Deakins, P.C.),* for the Respondent.
Matthew Holder, Esq. (David Van Os & Associates, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge**.** This case was heard in Fort Worth, Texas, over several days in March, April and May 2018. The complaint alleged that ADT, LLC (ADT or the Respondent) violated the National Labor Relations Act (the Act) by, inter alia: making various threats; firing Arthur Whittington because of his protected activities; refusing to apply its contract with the Communication Workers of America (the Union) to new hires in the bargaining unit; withdrawing Union recognition; making several unilateral changes in working conditions; and by neglecting several valid Union information requests.

On the entire record, including my observation of the witnesses' demeanors and consideration of posthearing briefs, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

At all material times, ADT,[2] a corporation with several Dallas–Fort Worth (DFW) area facilities, has sold, installed and serviced security systems. Annually, it purchases and receives at its DFW facilities goods worth more than $50,000 directly from out–of–state locales. It, thus admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act. It also admits, and I find, that the Union is a Section 2(5) labor organization.

II. ALLEGED UNFAIR LABOR PRACTICES[3]

A. Background

ADT's servicemen travel to DFW jobsites to install and service security systems. They are unionized. Their long-term bargaining relationship was memorialized in a collective-bargaining agreement that ran from May 29, 2011 to May 28, 2014 (the 2011–14 CBA). (GC Exh. 4.) It described the Union as the exclusive representative of this unit (the unit):

> [A]ll servicemen employed by . . . [ADT] . . . at its [DFW] facilities; excluding operators, office clerical employees, salesmen, confidential employees, alarm service investigators, supervisors, relief service supervisors and guards . . . .

(Id. at Art. 1). This litigation stems from a chronology of events, which is outlined below

[1] Unless otherwise stated, factual findings arise from joint exhibits, stipulations, and undisputed evidence.

[2] ADT was previously owned by Tyco International (Tyco). (CP Exh. 7). In 2012, ADT and Tyco separated.

[3] Judicial notice is taken of *ADT, LLC*, 365 NLRB No. 77 (2017) (i.e., a connected litigation involving an RM petition in the same bargaining unit), which involves many of the same undisputed facts at issue herein.

Date	Description	Pled as Unlawful	Found Unlawful
2010	ADT acquires Brinks Home Security Holdings, Inc., i.e., a non-Union security firm employing servicemen doing the same work as the Unit in the DFW region (the Brinks group). ADT kept these equally-sized groups ***(i.e., 48 in the Unit and 49 in the Brinks group)*** separate.	No	N/A
2010 to Sept. 2014	ADT hires more servicemen. It places some in the Unit, and others in the non-Union Brinks group ***(i.e., by the end of Sept. 2014, there were 57 in the Unit and 78 in the Brinks group)***.	No	N/A
Sept. 2014	ADT stops placing new servicemen in the Unit, and greatly accelerates its hiring in the Brinks group. This results in the Brinks group becoming the overwhelming majority of servicemen ***(i.e., by 2017, there were 51 in the Unit and 152 in the non-Union Brinks group)***.	Yes	***Yes***
Sept. 2014	ADT reorganizes its workforce, ***commingles the Unit and Brinks groups, and places all servicemen under equivalent working conditions***.	No	N/A
May 2017	ADT asserts that, because the Brinks group now outnumbers the Unit by a 3 to 1 ratio, and all servicemen perform the same jobs, are intermingled and work under equivalent conditions, the Unit's discrete identity has been lost and ***withdrawal of recognition is warranted***.	Yes	***Yes***

B. 2010—Brinks Acquisition

In May 2010, ADT, which employed the DFW unit, acquired Brinks, which employed the Brinks group (i.e., nonunion servicemen performing the same security work in the same DFW market).[4] (CP Exh. 7.) This resulted in ADT maintaining unit facilities in Carrollton and Halthom City, and nonunion Brinks facilities in Mesquite, Irving and South Loop.

C. 2014—ADT's Integration of the Unit and Brinks Groups

On February 3, 2014, ADT reorganized its DFW operations. It relocated its Carrollton office to a new Carrollton address, created 2 new facilities in Tyler and Trinity, retained its Halthom City office, and closed 3 former Brinks offices in Mesquite, Irving and Fort Worth. These changes resulted in the Brinks servicemen being integrated with unit servicemen at all DFW offices,[5] with the exception of Tyler, which remained solely staffed by unit servicemen. Following this reorganization, all DFW servicemen, whether included in the unit or not: performed the same assignments under constant working conditions; generally enjoyed comparable wages,[6] benefits, and work hours; possessed the same skills and overall experience; utilized the same tools, equipment, and vehicles to perform their tasks;[7] were employed in the same geographic region under the same conditions;[8] and were subject to the same supervision, overall management and policies.[9] *ADT,* supra, slip op. at 1–2.

D. RM–Petition Filing

On February 5, 2014, ADT emailed the Union and raised concerns regarding its ongoing majority status. On March 3, 2014, ADT filed an RM–petition with Region 16 of the National Labor Relations Board (the Board), which sought an election in a unit of *all DFW servicemen* (i.e., the extant unit and the Brinks group). Following a hearing, Region 16 found that an election was warranted amongst all servicemen. This decision was appealed to the Board.

E. ADT's Placement of Newly-Hired Servicemen Outside of the Unit

Following the Brinks acquisition, ADT's DFW servicemen work force grew exponentially. This chart demonstrates this growth and the placement of new servicemen hires:

Year	Union	Non-Union (i.e., Brinks group)
2010	48	49
2011	53	49
2012	57	58
2013	57	67
2014 (before 9/2014)	57	78
2014 (after 9/2014)	57 ***(0 more after 9/2014)***	97 (***21 more after 9/2014)***)

[4] Brinks operated a security system business called Broadview Security (Broadview).

[5] As a result of ADT combining its union and nonunion servicemen at the Carrollton, Halthom City and Trinity offices, the majority of the servicemen at these offices were not members of the historical unit.

[6] Although their method of compensation differs, overall wages are comparable.

[7] Assignments depend upon one's residence and operational issues.

[8] Employees from different offices periodically work together. There are transfers between offices.

[9] Labor Relations Manager James Nixdorf testified that ADT's historical Unit employees and the Brinks group had similar wages, jobs, tools and equipment, and were held out to the public as an interchangeable group. He added that they were regulated by a single human resources department, and shared the same community of interest. He stated that they were supported by a single management team and received the same assignments in the same area.

2015	56 ***(1 less after 9/2014)***	117 (***41more after 9/2014)***)
2016	51 ***(6 less after 9/2014)***	134 (***56 more after 9/2014)***)
2017	51 ***(6 less after 9/2014)***	152 (***74 more after 9/2014)***)
2018	51	165

(R. Exhs. 8–9; and R. Exh. 3(from Case 16–RM–123509).)[10] The above chart demonstrates that, while the unit grew from 48 to 51 employees from 2010 to 2018 *(i.e., by 6%)*, the Brinks group grew from 49 to 165 employees during the same period *(i.e., by 337%)*. ADT failed to explain why it grew its work force in this manner, although this strategy clearly buffered its legal theory.

F. RM-Petition Dismissal

On May 17, 2017, the Board dismissed ADT's RM-petition. *ADT,* supra. ADT subsequently filed a motion for reconsideration, which was similarly denied.

G. ADT's Withdrawal of Recognition

On May 31, 2017, ADT refused to recognize the Union as the unit's representative. (R. Exh. 11). At that time, the parties were bargaining for a successor agreement. (R. Exh. 7).

H. Whittington Discharge

1. Background

In 2001, ADT hired Whittington as a serviceman. He was continuously employed until July 2016, when he was fired for exceeding his allotted lunchbreak. Manager Derek Roberts was his direct supervisor. Whittington had extensive union activity; he filed grievances, aided arbitrations,[11] served as an election observer, was a steward,[12] and bargaining team member.[13]

2. Prior discipline

On January 26, 2016, ADT issued Whittington a verbal writing warning for failing to follow instructions. (GC Exh. 34.) On April 4, 2016, ADT issued him a written warning for unsatisfactory work. (GC Exh. 33.)

3. Termination summary template

On July 13, 2016, Whittington was discharged for "fraud, falsification of company records, falsification of information, [and] misstatement of facts . . . while on duty," on the basis of these incidents:

> During an audit of timecards, . . . [he]claimed 30 minutes for lunch each day but did not claim the drive time to his home where he was taking his lunch. Going home each day was out of his way and not close to his assigned jobs. On 6/1/16, lunch and drive time totaled 99 minutes, 6/8/1, 70 minutes, 6/10/16, 104 minutes, 6/14/16, 78 minutes, 6/17/16, 64 minutes, and 6/20/16, 53 minutes. . . .

(GC Exh. 32).

4. Lunch duration

As an initial matter, in order to determine whether Whittington exceeded his lunch, it is first necessary to determine how long his lunch was. The 2011–2014 CBA covers this issue and states that unit employees receive "a one (1) hour lunch period . . . between 11:00 a.m. and 2:00 p.m." (GC Exh. 4 at art. 6.) ADT's legal counsel conceded this point.[14] (Br. at 8, fn. 6).

5. The witnesses

a. ADT's stance

Roberts testified that he accidentally uncovered Whittington's lunch violations, while looking over job reports. He stated that he noted lengthy drive times for Whittington on certain dates, which led him to discover that he was stopping at home for lunch and lingering. Following this discovery, he emailed Human Resources Director Carolyn Vassey on June 16, 2016, and lobbied for Whittington's firing. (R. Exh. 2.) Vassey directed him to gather supporting documents, which he did. (R. Exh. 5). Prior to meeting with Whittington, he accrued GPS and other records of his travel times and whereabouts.[15] (R. Exhs. 4–5.)

On June 30, 2016, Roberts summoned Whittington to an investigatory meeting, where he was suspended pending investigation. He recollected Whittington speculating about his actions, but, generally failing to offer a concrete explanation.[16] Roberts contended that lunch begins when you leave a customer's house, but, acknowledged that he has not directly discussed lunch stop and start times with his subordinates. Although Roberts acknowledged that he never traveled the routes at issue to observe if there were construction delays or other traffic issues, he said that the insufficiency of Whittington's excuses and recall, and the supporting documentation showing that he exceeded his lunchbreak merited dismissal.

Roberts noted that Whittington claimed that drive time was not included in his lunch period and denied breaching any policy. (GC Exh. 32.) He also reported that a "random sample of four service techs was reviewed for . . . June . . . [and] each tech had one day where they failed to enter their lunch period on their timecard, but, no other discrepancies . . . [and] appropriate coaching will be done."[17](Id.) He noted that he reviewed

[10] Judicial notice has been taken of the underlying record and exhibits in Case 16–RM–123509.

[11] See, e.g. (GC Exhs. 27, 31.)

[12] He was the lead shop steward, and estimated that, in 2015 and 2016, he filed 50 grievances.

[13] He attended 10 negotiating sessions in 2016 before his firing, and 3 sessions thereafter.

[14] This is a surprisingly murky point in the record. ***First***, Whittington's time cards always (i.e., on days at issue and days not) record a 30-minute lunch, instead of the contractual hour. There is no explanation for this anomaly. ***Second***, both employees Skelton and Whittington credibly testified that management told them that lunch was only 30 minutes. There was, again, no explanation. These facts are noted, but, outweighed by the 2011–2014 CBA and counsel's concession.

[15] Data was derived from company vehicles, which are equipped with GPS and tracking systems.

[16] He denied that Whittington raised his diabetes or a need to check his blood sugar levels at home as a rationale.

[17] This memo failed to note that these employees had their GPS checked in the same manner as Whittington, and whether any conclusions were reached. It also acknowledged that these employees were only coached, as opposed to terminated, as was the case with Whittington.

Whittington's driving records to gauge if it was a one-time or multiple-time event before considering his termination, and concluded that he was a repeat offender, who warranted discharge.

Labor Relations Manager Nixdorf testified that Whittington's actions were intentional and merited removal. He denied knowing that he had diabetes when he was fired. He averred that driving time counted towards lunch, unless lunch was in route to the next assignment.

b. GC's Position

Whittington said that he was blindsided by the June 30 meeting. He said that, when Roberts asked him about his lunch usage, he speculated that he might have faced road delays, but, was unsure about specifics due to the passage of time. He agreed, however, that he occasionally went home for lunch due to his diabetes and need to check his blood sugar levels, which management knew about. He said that, even though management told him that lunch was 30 minutes, he still took up to an hour under the 2011–2014 CBA. Employees Lindner, Skelton and Whittington testified that lunch began when one arrived at their lunch stop (i.e., not when you left your last assignment).

6. Dates at Issue

ADT terminated Whittington for exceeding his allotted lunch on June 1, 8, 10, 14, 17, and 20. Although the validity of his discipline is evaluated in the *Analysis* section below, it is worth noting that his discipline is premised upon 2 bases: (1) he exceeded his allotted lunch; and (2) in doing so, his drive time to his break destination counts towards lunch.[18]

a. June 1, 2016

On this date, he was accused of taking a 99-minute lunch. (GC Exh. 32.) Records show that he left his assignment at Texas Drive Auto in Dallas at 11:14 a.m. and arrived in Richardson at 1:24 p.m. for his next assignment (i.e., 130 minutes later). (R. Exh. 5.) Given that his drive between assignments was 30 minutes,[19] if his 60-minute lunch were added in, he went over his lunch by 40 minutes on this date (i.e., not including drive time to lunch),[20] which is excessive.

b. June 8, 2016

On this date, he was accused of taking a 70-minute lunch. (GC Exh. 32.) Records show that he left Monta Ramen Restaurant in Richardson at 12:44 p.m., stopped at home, and arrived at Fuzzy's Taco Shop in Lewisville at 2:24 p.m. (i.e., 100 minutes later). (R. Exhs. 2, 5.) Google Maps shows that, if he proceeded directly from Monta Ramen to Fuzzy's, he would have driven for 32 minutes. (Id.). Thus, if his 60-minute lunch and valid 32-minute commute are added, he could have properly expended 92 minutes between assignments. Although his 100-minute hiatus between assignments went over by 8 minutes (i.e., not including drive time to lunch), this was reasonable.[21]

c. June 10, 2016

On this date, he was accused of taking a 104-minute lunch. (GC Exh. 32). Records show that he left Leann Bridal in McKinney at 10:47 a.m., stopped at home,[22] and arrived at SFMG Wealth Advisors in Plano at 1:01 p.m. (i.e., 134 minutes later). (R. Exhs. 1, 2, 5). Google maps shows that the direct route from Leann Bridle to SFMG is 30 minutes. (Id.). Thus, if his 60-minute lunch and valid 30-minute commute are added, he could have reasonably expended 90 minutes between assignments. However, he took 134 minutes, which went over his allotted lunch by 44 minutes (i.e., not including drive time to lunch), which was clearly excessive.

d. June 14, 2016

On this date, he was accused of taking a 78-minute lunch. (GC Exh. 32). Records show that he left Linda Parker, MD in Allen at 11:11 a.m., stopped at home,[23] and arrived at Flag Systems in Farmers Branch at 1:07 p.m. (i.e., 110 minutes later). (R. Exhs. 2, 5.) Parker was 32 minutes from Flag Systems,[24] which means that, if his 60-minute lunch were included, he went over his lunch by 18 minutes, which is not excessive, given the likelihood of driving delays.

e. June 17, 2016

On this date, he was accused taking a 64-minute lunch. (GC Exh. 32). Records show that he left Envision Imaging in McKinney at 11:57 a.m. and arrived at Sassy Beauty in Dallas at 1:37 p.m. (i.e., 100 minutes later).[25] (R. Exhs. 2, 5.) Envision Imaging is 37 minutes from Sassy Beauty,[26] which means that, if his 60-minute lunch were included, he would have gone over his lunch by 3 minutes, which was reasonable.

f. June 20, 2016

On this date, he was accused of taking a 53-minute lunch.[27] (GC Exh. 32.) Records show that he left Kilburn Investment in Frisco at 10:36 a.m. and arrived at Kula Sushi in Plano at 11:56 a.m. (i.e., 90 minutes later).[27] (R. Exhs. 2, 5.) Kilburn Investment is about 24 minutes from Kula Sushi,[28] which means that, if his 60-minute lunch were included, he would have gone over his lunch by 6 minutes, which does not appear excessive.

[18] This section evaluates whether he exceeded his allotted 1-hour lunch; the drive time issue is subsequently evaluated in the *Analysis* sections under unilateral changes.

[19] Judicial notice is taken of https://www.mapquest.com/directions to calculate route distance.

[20] He did not stop at his home address on this date.

[21] An 8-minute delay in a major urban area such as Dallas, where traffic periodically arises, is not unreasonable.

[22] ADT received a Geofence alert showing that he went to his home address during work hours. (R. Exh. 5.)

[23] ADT received a Geofence alert showing that he went to his home address during work hours. (R. Exh. 5.)

[24] Judicial notice is taken of https://www.mapquest.com/directions to calculate route distance.

[25] He did not stop at home on this date.

[26] Judicial notice is taken of https://www.mapquest.com/directions to calculate route distance.

[27] Given that lunch is an hour, it's unclear why he was even disciplined for a 53-minute lunch. However, as will be discussed, his time usage was nevertheless reasonable on this date.

[27] He did not stop at home on this date.

[28] Judicial notice is taken of https://www.mapquest.com/directions to calculate route distance.

g. Summary

In sum, although ADT fired Whittington for exceeding his lunch on June 1, 8, 10, 14, 17, and 20, the records reveal that he only acted unreasonably on June 1 and 10 and acted reasonably on the other days at issue. This assessment does not consider whether Whittington was permitted to use reasonable additional time to address his diabetes, or whether drive time to a reasonably-distanced lunch stop is properly excluded from one's 1-hour lunch, which are two additional factors that turn in Whittington's favor, as described in the *Analysis* section.

Information Requests

1. October and December 2014 requests

In October, Whittington asked ADT for new hire information. In December, Union Representative Kevin Kimber reiterated this request, and asked for new hire list with seniority dates. On December 19, Kimber requested a list of unit and nonunit Brinks servicemen. (CP Exh. 1.) On the same date, Nixdorf asked why this information was relevant. (GC Exh. 8, R. Exh. 12.) There is no evidence that ADT replied, beyond Nixdorf's query.

2. October 29, 2015 request

Union Representative Jerell Miller asked for this data regarding pending grievances:

> i. The reasons for the company decision . . . complained of in the grievance.
> ii. All company policies that the company contends support the decision . . . .
> iii. All documents . . . reviewed . . . [in] making the company decision . . . .
> iv. All documents . . . relied upon . . . [in] making the company decision . . . .
> v. Specification of all . . . agreement terms . . . relied on . . . .
> vi. Specification of . . . bargaining history that the company relied on . . .
> vii. Any. . . bargaining history records . . . relied on . . . .
> viii. Any . . . arbitration awards that the company relied on . . . .
> ix. Specification of … past practices relied upon . . . .
> x. Any . . . records of past practices relied upon by the company . . . .
> xi. Any . . . employee training records relating to the company decision . . . .
> X11. If the company contends that the grievance is not . . . arbitrable, specification of . . . reasons for such contention.

(GC Exhs. 9–18). ADT did not reply to this request.

3. October 30, 2015 request

Miller asked ADT for this information on Brian Sauser's disciplinary grievances:

> [The] . . . policy under which . . . [he] was suspended/terminated. . . .
> [G]uidelines, . . . utilized . . . in evaluating [his] . . . request for . . . leave . . ..
> [G]uidelines, . . . concerning . . . rules for attendance; . . . .
> [All] performance evaluations . . . .
> [All] commendations received . . . from . . . supervisors, and customers . . . .
> [A]ttendance records for the two years prior to the . . . suspension/termination; . . . .
> [T]he Grievant's personnel file; and . . . .
> [D]ocuments stating . . . all reasons [behind his termination]….
> [A]ll documents relied upon . . . . in reaching the company decision . . . .

(GC Exh. 19). ADT did not reply.

4. November 19, 2015 request

Miller requested this information on another pending grievance:

> i. The reasons for the company decision . . . .
> ii. All company policies that … support the decision . . .
> iii. All documents . . . reviewed . . . [in] making the company decision. . . .
> iv. All documents . . . relied upon . . . [in] making the company decision . . . .
> v. . . . [A]ll . . . agreement terms . . . relied on in . . . the company decision . . .
> vi. . . . [A]ll bargaining history . . . relied on in . . . the company decision . . . .
> vii. … [A]ll bargaining … records . . . relied on . . . .
> viii. . . . [P]ast practices relied upon . . . in reaching the company decision ….
> ix. . . . [R]ecords of past practices relied upon ….
> x. [All of ADT's] reasons [and defenses, if any, regarding arbitrability] . . . .

(GC Exh. 20). ADT did not reply.

5. January 8, 2016 request

The Union sought personnel records for Chad Short. (GC Exh. 22). ADT did not reply.

6. July 15 and 27, 2016 requests

On July 15, the Union sought these documents connected to Whittington's firing:

> i. All . . . records . . . [of] work performance . . . [for the last] 2 years . . . .
> ii. All . . . records . . . [of] conduct . . . [for the last] 2 years . . . .
> iii. . . .A]nnual performance appraisals . . . [for the last] 3 [years] . . . .
> iv. A list of all employees . . . interviewed . . . .
> v. A list of all . . . [non] employees . . . interviewed . . . .
> vi. All . . . arbitration awards . . . relied on in reaching the decision . . . .
> vii. All non-company documents . . . relied on in reaching the decision . . . .
> viii. A list of all other employees in the ix . . . [DFW] area who have been disciplined . . . for . . . similar reasons within the past . . . 3 . . . years.

(GC Exh. 23.) On July 27, it also sought this information for Whittington:

> i. What technology . . . track[s] . . . [Unit] employees while on the job?
> ii. Is the employee's location determined by a device on the …

truck?
iii. Is the employee's location determined by . . . a Company issued phone?
iv. Is the employee's location determined by . . . a Company issued laptop?
v. Is there more than one device tracked for each employee?
vi. If . . . tracking [occurs by] . . . alternative means, . . . specify that technology.
vii. How is this information tabulated?
viii. . . [[C]opies of . . . data collected during . . . April, May and June of 2016 for . . . [Unit] employees. . . .

(GC Exh. 24). ADT partially replied on July 22 and August 9, 2016. (R. Exhs. 13–14.)

7. March 23, 2017 request

The Union requested this information regarding subcontracting of Unit work:

i. [From 2015 to 2017] . . . dollars spent on [DFW] subcontracting . . . .
ii. . . . [For a]ll [DFW] subcontractors . . . [in these years]:
a. The number of contracts
b. The total cost of each contract
c. The type of work performed
d. The reason for such subcontracting
e. The number of hours worked on each subcontract
f. The criteria used to evaluate . . . job bids . . . .
iii. Provide criteria for acceptance of work by each subcontractor.
iv. Provide . . . [the] nature of work and geographic location.
v. Provide . . . all analyses of contract labor work quality and productivity.

(GC Exh. 25). ADT did not reply.

8. March 24, 2017 request

The Union requested the following in connection with an arbitral award:

i. Identify all persons . . . employed by ADT . . . perform[ing] security system installation and repair in the . . . [DFW region] . . . .
Payroll records . . . for [such] employees . . . from January 1, 2014 to the date of this request.
The quarterly Texas Workforce Commission Form C-3 filings . . . for [such] employees . . . from January 1, 2014 to the date of this request.
. . . [S]ummary plan descriptions for health and welfare benefits provided to [such] employees . . . from January 1, 2014 to the date of this request.
For each SPD produced . . ., identify . . . [the applicable] employees . . . .
. . . SPDs for pension and/or retirement benefits provided to employees in [DFW]—who performed security system installation and repair from January 1, 2014 to the date of this request.
For each SPD produced . . ., identify . . . [the applicable] employees . . . .

(GC Exh. 26). ADT did not reply.

J. December 15, 2015 Meeting

ADT Manager Roberts acknowledged that he told Unit employees at a December 2015 training meeting that, if they didn't like what he was saying, they could leave and find other jobs. He recalled adding that, if they did not like ADT, there were plenty of other employers hiring. (Tr. 58.) He recalled making this comment in relation to complaints about assignments. Employees Lindner, Bieker, and Skelton corroborated Roberts' account.

K. May 20, 2016 Meeting

Employees Bieker and Skelton testified that, on this date, manager Andy Shedd stated at a meeting in response to complaints about sick leave policy that, if you don't like it, you can leave. Roberts did not recall this statement. For several reasons, I credit Bieker and Skelton and find that Shedd made this comment. ***First***, they were credible witnesses, with strong demeanors and recollections, who testified in straightforward and consistent manners. ***Second***, Roberts had a poor recollection of this meeting. ***Finally***, Shedd was not called to deny the comment.[29]

L. August 2017 Meeting

Employees Grinnell and Skelton testified that, at a training meeting, supervisor Raymond said that employees would not receive raises because of the Union contract. Roberts did not recollect this comment. I credit Grinnell and Skelton. ***First***, they were each credible and consistent witnesses, with strong demeanors. ***Second***, Roberts had a poor recollection of the meeting. ***Finally***, Raymond was not called to deny the comment. *Douglas Aircraft*, supra.

M. Unilateral Changes

The complaint alleges that ADT made unilateral changes in the Unit's terms and conditions of employment. Some changes occurred before the withdrawal of recognition and some after. Although that ADT failed to notify the Union or bargain over these changes, it asserts that it was contractually permitted to enact certain changes, it did not change anything in other cases, and it validly made most changes after lawfully withdrawing recognition.

1. Prewithdrawal of recognition changes

a. May 2016—Sick Leave

Employees Bieker and Lindner said that ADT previously let workers use sick leave with an hour's notice of their intended absence and that there was no doctor's note requirement. They said that, in May 2016, ADT began requiring a doctor's note. ADT acknowledges this change.

b. May 2016—Lunchbreaks

Employees Lindner and Bieker said that ADT changed its lunch break policy from one where a break began once

[29] See *Douglas Aircraft Co.*, 308 NLRB 1217 (1992) (failure to call a witness "who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference . . . regarding any factual question on which the witness is likely to have knowledge.").

employees arrived at their meal destination (i.e., the commute from your assignment to a lunch destination did not count) to one where lunch began once you left your last assignment. ADT disputed making this change; Nixdorf testified that lunch always began when you left your assignment. For several reasons, I credit employees Lindner and Beiker. *First*, they were stellar witnesses with strong demeanors. *Second*, Nixdorf appeared less than credible. He seemed to be more concerned with advocating ADT's labor relations stance than providing a candid account. *Finally*, if the lunch start time procedure were as well-entrenched, ADT claims, it would surely have been able to produce documents supporting its allegedly concrete past practice, which it conspicuously failed to do.

2. Postwithdrawal of recognition changes

After withdrawing recognition, ADT made these undisputed unilateral changes: it stopped providing separate vacation and sick leave banks, and combined all leave into a single paid time off (PTO) bank; it reduced bereavement leave from 5 to 3 days; it changed its pay policies to reward customer upsells, create new sales quotas, and implement discipline for missed quotas; it stopped processing grievances; it ceased deducting Union dues from paychecks; and it changed pay periods from weekly to biweekly.

III. ANALYSIS

A. The 8(a)(1) Allegations

1. December 15, 2015 (Roberts' Threat),[30] and May 20, 2016 (Shedd's Threat)[31]

Roberts and Shedd violated the Act. Roberts told employees that, if they didn't like ADT's assignment policy, they should leave. Shedd related that, if workers didn't like the sick leave policy change, they should resign. Such commentary is unlawful and is treated as an implicit discharge threat of discharge. See, e.g., *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177, slip op. at 1 (2018); *McDaniel Ford*, 322 NLRB 956 (1997).

2. August 2017—Raymond's Comment[32]

Raymond unlawfully told employees that they could not receive raises because of the Union contract. An employer violates the Act, when, "it advises employees that it will withhold wage increases or accrued benefits because of union activities." *Invista,* 346 NLRB 1269, 1270 (2006); *Earthgrains Baking Cos*., 339 NLRB 24, 28 (2003).

B. The 8(a)(3) Allegations[33]

ADT unlawfully fired Whittington. The GC made a prima facie showing. ADT failed to show that it would have taken such action, absent his protected activity.

1. Legal precedent

The framework for analyzing whether discipline violates §8(a)(3) is set out in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), which requires the GC to show, by a preponderance of the evidence, that protected conduct was a motivating factor in the adverse action. This initial burden is met by showing protected activity, employer knowledge and animus. If the GC meets this showing, the burden shifts to the employer to prove that it would have taken the same adverse action, absent the protected activity. *Mesker Door*, 357 NLRB 591–592 (2011). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action, absent the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086, 1087 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), it fails to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). Further analysis is, however, required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in its motivation, it would have still taken the same action for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

2 Prima facie case

The GC made a prima facie showing that Whittington's protected activity was a motivating factor. He was a shop steward, grievance-filer, election observer, arbitral advocate, and bargaining team member. ADT was aware of these activities. There is evidence of animus in the form of threats, and improper withdrawal of Union recognition.

3. Affirmative defense

For several reasons, ADT failed to show that it would have fired Whittington, absent his protected activity. ***First***, although it fired him for exceeding his lunchbreak on 6 occasions, he only acted unreasonably on 2 of the 6 dates. Hence, the vast majority of its rationale for firing him was pretextual. Its willingness to forge ahead with a firing, when 4 of its 6 underlying accusations were false, is deeply suspect. *Second*, ADT wholly failed to show: that other servicemen never exceeded their lunchbreaks as Whittington did; never took less efficient routes between assignments as Whittington did; or that it consistently reacted in the same way whenever such transgressions occur. Roberts painted a very different picture, and only indicated that he made a cursory and random review of some other drivers, and reached the conclusion that Whittington was the sole violator.[34] Whittington's discipline, as a result, appears to be more focused on ADT trying to rid itself of a Union adherent rather than evenhandedly enforcing its rules.[35] ***Third,*** it is suspect that, even though ADT receives immediate Geofence alerts whenever workers drive company cars to their homes during business hours, it tacitly ignored multiple Geofence alerts for

[30] This allegation is listed under complaint pars. 7 and 32.
[31] This allegation is listed under complaint pars. 8 and 32.
[32] This allegation is listed under complaint pars. 9 and 32.
[33] This allegation is listed under complaint pars. 10-13, and 33.
[34] This is not credible, given that Robert never said who else he investigated, or provided corroborating details and records. It is not plausible that, out of 200 workers, Whittington is the sole worker who took exceeded his lunch.
[35] If ADT wished to evenhandedly enforce its rules, it would have investigated the lunchbreak usage of its entire DFW servicemen workforce. Its glaring failure to do so suggests a willingness to blindly accept other foreseeable lunch violations, in order to eradicate a Union adherent.

Whittington, in order to allow his discharge case to build. Its failure to promptly intervene and opt to, instead, build up a termination case against a long-term employee suggests invidious treatment.[36] *Four**th***, ADT has not demonstrated Whittington's route choices were unreasonable, or that he was always obligated to take the most efficient route as presented by Google Maps or Mapquest. ADT lacks a definitive policy on these issues.[37] Additionally, ADT never researched Whittington's specific route choices on the days at issue to confirm that he was not traveling in a reasonable way to avoid traffic. *Fifth*, ADT's policy regarding lunchbreak length and whether drive time to lunch is included in a break is ambiguous, at best. Some employees think that drive time is a part of their lunch and others do not. Although the 2011–14 CBA expressly states that the lunchbreak is an hour in length, some employees still think that it is 30 minutes in length based upon management comments. Even though ADT could have cleared up these ambiguities regarding a basic and repeated personnel issue, there is no evidence that it has ever done so. It, instead, seized upon this its murky lunch period rule to use it as a mechanism to eliminate a Union adherent, which is suspect.[38] ***Sixth***, as will be discussed more fully below, Whittington was disciplined, in part, on basis of ADT's invalid unilateral change that newly included drive time to a lunch stop as part of one's lunchbreak. ***Finally***, ADT's unwillingness to investigate the diabetes component of Whittington's case raises another red flag.[39] Based upon these reasons, all of which would stand in isolation, I find that Whittington's firing was invalid.

C. The 8(a)(5) Allegations

1. Placement of new servicemen outside of the unit[40]

The complaint alleges that, since September 1, 2014, ADT has not applied the 2011–2014 CBA to new servicemen. ADT does not dispute this action and avers that it validly placed new servicemen outside the extant Unit because it was both awaiting the Board's RM-petition decision, and because it could have withdrawn Union recognition.

a. Precedent

Generally, an employer violates Section 8(a)(5), when it fails to maintain existing conditions of employment for bargaining unit employees following the expiration of their contract. *Allied Signal*, 330 NLRB 1201, 1216 (2000). This obligation to maintain the status quo reflects black-letter labor law. See, e.g., *Litton Business Systems v. NLRB*, 501 U.S. 190, 198 (1991); *Avery Dennison*, 330 NLRB 389, 391 (1999). The Board has, therefore, consistently reached this holding in scenarios, where employers failed to apply collective-bargaining agreements to new hires covered by a contract's recognition clause. See, e.g., *Triple A Fire Protection*, 315 NLRB 409, 416-419 (1994) (failure to contractual wage increases after contract expiration to new hires); *Utility Vault Co.*, 345 NLRB 79, fn. 2, 82–-88 (2005).

b. Analysis

ADT violated §8(a)(5) by failing to include new employees in the Unit since September 2014. It is well-established that the recognition clause in a collective-bargaining agreement must be applied to new hires in covered classifications. The Board has held that:

> It is axiomatic that when an established bargaining unit expressly encompasses employees in a specific classification, ***new employees hired into that classification are included in the unit.*** This inclusion is mandated by the Board's certification of the unit or by the parties' agreement regarding the unit's composition.

Gourmet Award Foods, 336 NLRB 872, 873 (2001) (emphasis added). Given that the Unit described in the 2011–14 CBA plainly and clearly covers newly hired "servicemen employed by the Employer at its facilities located in Dallas and Fort Worth, Texas," ADT lacked a valid basis for not including such employees in the Unit. (GC Exh. 4). It is undisputed that these employees performed Unit work, and there is simply no exception in the CBA regarding the inclusion of these employees. As a result, a plain reading of the CBA requires that, as long as the collective-bargaining relationship existed, which was the case from at least September 2014 until ADT's May 2017 withdrawal of recognition, the Unit's recognition clause had to be applied to new hires in covered classifications.[41]

ADT's asserted defenses are invalid. ***First***, it contends that the pendency of the RM- petition excused it from applying the Unit recognition clause to new hires. This contention has been repeatedly rejected by the Board, which has very clearly held that employers are required to apply their contract's unit recognition clause and all other aspects of the collective-bargaining agreement while an RM-petition is pending. See, e.g., *W. A. Krueger*, 299 NLRB 914, 915 (1990) (holding that obligations to bargain are not be suspended, until the date the RD or RM certification issues, and, therefore, any unilateral changes made *before* the issuance of the certification are unlawful). *Second*, it contends in its brief that, because it allegedly could have withdrawn

[36] Its unwillingness to promptly intervene suggests that it was more focused on removing a Union adherent rather than rehabilitating a long-term worker, with a reliable track record who held a substantial training investment.

[37] ADT could easily remedy this route choice issue, but, has taken no action in this regard.

[38] ADT could, for example, easily create a rule that governs: lunch period length; whether drive time to lunch is included; whether short detours are valid; whether eating lunch at home is valid; and whether one must follow the best GPS route. Its failure to address these clear and foreseeable issues, and, instead, use the ambiguity that it created through inaction to remove a Union adherent smacks of invidious intent.

[39] I credit Whittington's testimony that he advised Roberts about his diabetes. He was a credible witness, with a stellar demeanor. ADT wholly failed to investigate whether diabetes played a role in his legitimate need to go home for lunch or sporadically caused him to exceed his break. This investigatory failure suggests invalid treatment.

[40] This allegation is listed under complaint pars. 17 and 34.

[41] ADT's actions in this regard can also be analogized to unilaterally reassigning unit work to individuals outside the unit, without providing the collective bargaining representative with notice and an opportunity to bargain, which is similarly unlawful. See, e.g., *St. George Warehouse, Inc.*, 341 NLRB 904, 905-906 and 924 (2004), enfd. 420 F.3d 294 (3d Cir. 2005); *Stevens International*, 337 NLRB 143 (2001); *Regal Cinemas, Inc.*, 334 NLRB 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003).

recognition of the Union in early 2014, it earned the right to place new hires outside of the Unit since that point. This argument is invalid. ADT cites no precedent for this conclusion. In addition, ADT's claim that it could have withdrawn recognition in early 2014 is just surmise. The reasonableness of this claim is undercut by the overwhelming reality that it never tested its hypothesis in a contemporaneous Board proceeding.[42] As a result, this claim is "Revisionist history."[43] *Finally*, even assuming arguendo that ADT could have momentarily withdrawn recognition for a narrow window in 2014, its window was fleeting and it abruptly lost this right, once it exponentially expanded a new hire workforce that should have been included in the Unit. As will be discussed more fully below, the Brinks majority quickly became an isolated minority, once ADT hired several new servicemen in 2014 and 2015.[44]

In sum, given that the established Unit expressly covered newly-hired DFW servicemen, such new servicemen must be included in the unit. The following chart summarizes how the Unit should have grown, had ADT properly placed new servicemen in the unit:

Year	Existing Unit	New Hires to be Included in Unit	Total Unit	Non-Union Brinks Group
2014 (before 9/1)	57		57	78
2014 (after 9/1)	57	21	78	78
2015	56	41	97	78
2016	51	56	107	78
2017	51	74	125	78

2. Prewithdrawal of recognition unilateral changes[45]

ADT unlawfully changed its sick leave and lunch policies in May 2016. It changed its sick leave policy from one where employees could use leave with an hour's notice to one where they had to provide a doctor's note. It changed its lunch policy from one where lunch began at your lunch stop to one where it began once you left your assignment before lunch.

I. LEGAL PRECEDENT

The Board has held that, "[u]nder the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes." *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 205 (2011). An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment, even where such practices are not expressly set forth within a collective-bargaining agreement. Id. The party asserting the existence of a past practice bears the burden of proof on the issue, and must show that the practice occurred with such regularity and frequency that employees could reasonably expect it to reoccur on a consistent basis. *Palm Beach Metro Transportation, LLC*, 357 NLRB 180, 183-184 (2011), enfd. 459 Fed. Appx. 874 (11th Cir. 2012).

b. Analysis

ADT unlawfully unilaterally changed its sick leave and lunch-break polices. These subjects are mandatory bargaining topics, which were modified without affording the Union notice or an opportunity to bargain. See, e.g., *Flambeau Airmold Corp.*, 334 NLRB 165 (2001) (sick leave); *Interstate Transport Security*, 240 NLRB 274, 279 (1979) (doctor's note for sick leave); *Mackie Automotive Systems*, 336 NLRB 347, 350 (2001) (lunch).

Although ADT contends in its brief that it was permitted to modify the sick leave policy under the management rights clause, this argument is flawed on two bases. ***First***, the Board has consistently held that a waiver of bargaining rights under a management-rights clause does not survive the expiration of a contract. See, e.g., *Buck Creek Coal*, 310 NLRB 1240 (1993); *Kendall College of Art*, 288 NLRB 1205, 1212 (1988). In the instant case, ADT unilaterally changed its sick leave policy 2 years after the 2011–2014 CBA expired. ***Second***, even assuming arguendo that the management rights clause survived contract expiration, the very general waiver present in the 2011-14 CBA is a broadly worded management rights clause that does not contain a clear and unmistakable waiver of the Union's right to bargain over sick leave policy. See, e.g., *California Offset Printers*, 349 NLRB 732, 733 (2007) (reversing judge for relying on "general authority" of employer under contract to "establish and enforce shop rules" to "discipline or discharge for cause" and "to establish work schedules and make changes therein," to find waiver of right to bargain over establishment of rule requiring employees to be on call for sudden schedule changes); *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1016 (1982) (employer's authority under management-rights clause to continue and change reasonable rules and regulations as it may deem necessary does not establish "that the Union waived its right to bargain about absentee rules" as this clause lacks express reference to absenteeism or tardiness rules).

Regarding the lunch policy, ADT contends that it was never modified. This argument is invalid, inasmuch as the record reflects that the lunch policy changed from one where lunch previously began when an employee arrived at his lunch destination to one where it now began when you left your last assignment.

3. Withdrawal of recognition and accretion[46]

a. Withdrawal of recognition

ADT unlawfully withdrew Union recognition on May 31,

[42] It is implausible that ADT would have voluntarily endured a heavily-litigated RM petition and met its other labor relations commitments , if it could have withdrawn recognition and divorced an unwanted partner.

[43] "Revisionist history" is a podcast by commentator Malcolm Gladwell, which revisits misunderstood past events.

[44] ADT's tenuous withdrawal theory was an evolving landscape that shifted against its favor with its hiring surge.

[45] This allegation is listed under complaint pars. 18-20, and 34.

[46] This allegation is listed under complaint pars. 17 and 34. As noted, ADT withdrew recognition in May 2017.

2017. It contends that it withdrew Union recognition because the Union represented a minority of servicemen. As discussed above, this assertion is flawed. Specifically, if ADT properly included new hires in the unit, unionized servicemen would have outnumbered the nonunion Brinks group by an almost a 2 to 1 ratio at the time of its withdrawal of recognition.[47]

b. Accretion

A key question raised by ADT's withdrawal of recognition is exactly what Unit it must now recognize. This is a novel issue, given that it is generally clear what group is a stake. This case, however, presents 3 groups of employees at issue. These groups are: Group 1 (i.e., the historical unit); Group 2 (the Brinks group that was never unionized); and Group 3 (new servicemen hires since September 2014). Although this decision has already found that ADT must recognize Group 1 (the historical Unit), and Group 3 (new hires, as analyzed above), the question of whether the Brinks group can stand alone, or should be accreted to the Unit must be gauged *in order for ADT to know exactly what Unit it must recognize under the Board's Order*. As discussed below, the Brinks group should be accreted to the Unit.

I. LEGAL PRECEDENT

The accretion doctrine seeks to "preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." *Frontier Telephone, Inc.*, 344 NLRB 1270 (2005). Since accretion forecloses employees' basic right to select a union representative by being absorbed into an existing bargaining unit, historically, the Board has followed a restrictive policy in applying the doctrine. *Towne Ford Sales*, 270 NLRB 311 (1984), enfd. 759 F.2d 1477 (9th Cir. 1985). As a result, the Board finds accretion "only where the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted." *E. I. Du Pont, Inc.,* 341 NLRB 607, 608 (2004), quoting *Ready Mix USA, Inc.*, 340 NLRB 946, 946-948 (2003) (citing *Safeway Stores*, 256 NLRB 918 (1981)).

In applying this standard, the Board examines several factors, including: interchange and contact among employees, degree of functional integration, geographic proximity, similarity of working conditions, similarity of employee skills and functions; supervision and collective-bargaining history. *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001). In determining, under this standard, whether the requisite overwhelming community of interest exists to warrant an accretion, the Board considers many of the same factors relevant to unit determinations in initial representation cases, i.e., integration of operations, centralized control of management and labor relations, geographic proximity, similarity of terms and conditions of employment, similarity of skills and functions, physical contact among employees, collective bargaining history, degree of separate daily supervision, and degree of employee interchange. *E. I. Du Pont*, supra at 608; *Compact Video Services*, 284 NLRB 117, 119 (1987). However, as stated in *E. I. Du Pont*, the "two most important factors" to an accretion finding are employee interchange and common day-to-day supervision. *Super Valu Stores*, 283 NLRB 134, 136 (1987), citing *Towne Ford Sales*, 270 NLRB 311, 312 (1984). Whereas with initial bargaining, a unit need only be appropriate, and not the most appropriate, the Board will only uphold accretion if the community of interest between the existing unit and the employees to be accreted is so closely integrated that the latter employees have "no true identity distinct from" the existing unit. *Frontier Telephone*, 344 NLRB at 259 fn. 6. As held in *Safeway Stores*, 256 NLRB 918 (1981), for the Board to find a valid accretion, the additional employees must not only share an overwhelming community of interest with the preexisting unit but must "have little or no separate group identity and thus cannot be considered to be a separate appropriate unit." Moreover, as held in a case cited by *Local 249, Universal Security Instruments v. NLRB*, 649 F.2d 247, 255 (4th Cir. 1981), cert. denied 454 U.S. 965 (1981), "The accretion doctrine is applied more strictly when the new group of employees is larger than the original unit."

II. ANALYSIS

In the instant case, all factors support accretion. As a threshold matter, the unionized contingent (i.e., including the disputed new hires) forms a majority of the servicemen workforce by a 2 to 1 margin. Regarding integration of operations, ADT relocated its Carrollton office to a new Carrollton address, created 2 new DFW facilities in Tyler and Trinity, retained its Halthom City office, and closed 3 former Brinks offices in Mesquite, Irving and Fort Worth. This resulted in the Brinks group being fully integrated with Unit servicemen at all DFW offices, with the exception of Tyler. Regarding centralized control of management and labor relations, these integrated offices are centrally controlled and managed by the same figures at ADT (i.e., Raymond, Vassey, Nixdorf, Roberts, Shedd, Arceneaux, etc.). Regarding geographic proximity and physical contact of employees, all servicemen have been commingled at the same DFW offices, with the exception of the Tyler office that employs only historical Unit employees. Regarding terms and conditions of employment, similarity of skills and functions, interchange, and degree of separate daily supervision, following the 2014 reorganization, all servicemen at ADT's DFW facilities, whether included in the Unit or not: perform the same or work under the same working conditions; generally enjoy comparable wages, benefits, and hours of work; possess the same skills and overall experience; utilize the same tools, equipment, and vehicles to perform their identical duties and assignments; are employed in the same geographic region under the same overall conditions; and are subject

[47] It is also noteworthy that the decertification petition that was signed by several unit employees in 2015 is irrelevant to this inquiry. ***First***, this petition, which was created in mid-2015, was too far removed in time from ADT's withdrawal of recognition. ***Second***, it is well-established that an employer cannot lawfully withdraw recognition from a union where it has committed unfair labor practices that directly relate to the employee decertification effort. See *Hearst Corp.*, 281 NLRB 764 (1986), enfd. 837 F.2d 1088 (5th Cir. 1988)). In the instant case, ADT's wholesale exclusion of all new employees from the Unit and its other unfair labor practices tainted the resulting employee disaffection in the petition. *Ardsley Bus Corp.*, 357 NLRB 1009 (2011).

to the same supervision, managerial hierarchy, and personnel policies. All of these factors overwhelmingly support accretion, including the two most important factors, employee interchange and common day-to-day supervision. Simply put, ADT's 2014 reorganization resulted in the Brinks group losing its separate identity, which warrants accretion to the larger unit.[48]

4. Postwithdrawal of recognition unilateral changes[49]

ADT violated the Act, when it unilaterally changed the Unit's paid leave system,[50] bereavement leave,[51] sales compensation system,[52] grievance procedure,[53] and pay periods.[54] It is well-established that, once a company unlawfully withdraws recognition from the union, its subsequent unilateral changes regarding wages, hours and other mandatory subjects are similarly unlawful. See, e.g., *Northwest Graphics, Inc*., 342 NRLB 1288, 1288 (2004); *Turtle Bay Resorts*, supra, 353 NLRB at 1275. ADT also violated the Act, when it unilaterally failed to remit dues to the Union. *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015) (under §8(a)(5), an employer's obligation to check off union dues continues after the expiration of a collective-bargaining agreement that establishes such an arrangement).

5. Information requests

ADT unlawfully failed to reply to the Union's information several requests. Given that its recognition withdrawal was invalid, it remained obligated to fulfill the Union's valid requests.

a. Legal precedent

An employer must provide requested information to a union representing its employees, whenever there is a probability that such information is necessary and relevant to its representational duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This duty encompasses the obligation to provide relevant bargaining and grievance-processing materials. *Postal Service*, 337 NLRB 820, 822 (2002). Information, which concerns unit terms and conditions of employment, is "so intrinsic to the core of the employer-employee relationship" that it is presumptively relevant. *U.S. Information Services*, 341 NLRB 988 (2004). Information about persons outside the unit, however, does not enjoy a presumption of relevance. *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006). Nevertheless, the burden to establish the relevance of extra-unit information requests is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983). In such cases, the Board uses a broad, discovery-type of standard to assess relevance. *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994).

b. Analysis

I. OCTOBER AND DECEMBER 2014 REQUESTS ABOUT NEW HIRES

ADT unlawfully neglected the Union's requests for new hire information. The Union, via Whittington and Kimber, repeatedly sought new hire information. This information was relevant to the Union's determination of whether ADT was breaching the CBA's recognition clause. There is no evidence that ADT replied to these requests or otherwise provided responsive information, beyond Nixdorf questioning its relevance.[55] (GC Exh. 8, R. Rxh. 12.)

II. OCTOBER 29, 2015 REQUESTS REGARDING GRIEVANCES

ADT unlawfully failed to respond to the Union's information requests regarding its pending out-of-classification work, overtime and work hour grievances. (GC Exhs. 9–18.) These requests involved mandatory bargaining subjects and were connected to grievances. It is undisputed that ADT did not reply; its sole defense rested upon its withdrawal of recognition.

III. OCTOBER 30, 2015 AND JANUARY 8, 2016 REQUESTS ABOUT UNIT DISCIPLINE

ADT unlawfully failed to respond to the Union's information requests about Brian Sauser's and Chad Short's disciplines (GC Exhs. 19–22). It also violated the Act, when it failed to fully respond to Union's information requests about Whittington's firing. (GC Exhs. 23–24.) As a threshold matter, it is well-established that disciplinary information is relevant and necessary to the Union's duty to advocate for disciplined members in grievances and arbitrations. Although ADT partially replied to the Union's request on Whittington (R Exh. 14),[56] this reply omitted several items, including his past performance appraisals.

IV. NOVEMBER 19, 2015 REQUEST CONCERNING "DOMINGUEZ & AVERITT"

ADT did not violate the Act, when it failed to comply with the Union's November 19, 2015 information request connected to "Dominguez & Averitt—Appropriate Materials." It is unclear exactly what this information request involved. Hence, it is not possible to assess whether the Union was seeking relevant information.

V. MARCH 23, 2017 REQUEST ON SUBCONTRACTING

ADT unlawfully failed to comply with the Union's March 23, 2017 information request for subcontracting information. (GC Exh. 25). There is no evidence that ADT replied to these requests. Subcontracting of unit work and connected information is relevant.

[48] ADT advanced this position, when it advocated the RM-petition at issue herein. *ADT*, supra. In that case, ADT vociferously contended that a wall-to-wall unit of all servicemen was the only appropriate unit on the basis of all of the factors described above. Region 16 also endorsed this position, when it found that an election in the entire group of servicemen (i.e., historical Unit, Brinks group and new servicemen) was warranted.

[49] These allegations are listed under pars. 34–37 and 41 of the complaint.

[50] ADT combined all leave hours into a single PTO bank.

[51] ADT reduced its bereavement leave benefit 3 days.

[52] ADT changed its sales compensation system by rewarding upsells of equipment and services to customers, implementing a sales quota, and enacting disciplinary consequences for the failure to make a sales quota.

[53] ADT proclaimed that it would no longer process grievances.

[54] ADT changed its pay periods from weekly to biweekly.

[55] Even though the Union later received employee lists at the ULP and RM hearings, its unfair delay was unlawful.

[56] ADT partially replied via an email dated July 22, 2016, and letter dated August 9, 2016. (R. Exhs. 13–14

VI. MARCH 24, 2017 REQUEST CONCERNING ARBITRAL AWARD

ADT unlawfully failed to comply with this arbitration data request. (GC Exh. 26. This request sought information about new hires excluded from the Unit in order to assess their damages under a connected arbitral award. (GC Exh. 31). This information was, and remains, relevant to the Union's representational responsibilities regarding such workers.

CONCLUSIONS OF LAW

1. ADT is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and, at all material times, was the exclusive bargaining representative for the following appropriate unit:

> [A]ll servicemen employed by the Employer at its facilities located in Dallas and Fort Worth, Texas; excluding operators, office clerical employees, salesmen, confidential employees, alarm service investigators, supervisors, relief service supervisors and guards as defined in Act.

4. ADT violated Section 8(a)(1) by:

a. Inviting employees to quit in response to their activities on behalf of the Union and exercise of protected concerted activities.

b. Threatening employees that their pay raises would be withheld in an effort to discourage their support for the Union.

5. ADT violated §8(a)(3) by suspending and discharging Whittington because he engaged in Union and other protected concerted activities.

6. ADT violated §8(a)(5) by:

a. Withdrawing recognition from the Union on May 31, 2017.

b. Refusing to recognize the Unit as the collective-bargaining representative of newly hired servicemen since September 1, 2104, and failing to include these employees in the Unit.

c. Unilaterally changing its sick leave policy by requiring a doctor's note.

d. Unilaterally changing its lunch start time by beginning lunch once employees leave their assignment immediately before lunch.

e. Unilaterally changing its leave system by combining vacation and sick time into a single PTO leave bank.

f. Unilaterally reducing its bereavement leave benefit from 5 to 3 days.

g. Unilaterally changing its sales quotas and connected disciplinary system.

h. Unilaterally eliminating the grievance and arbitration procedure.

i. Unilaterally purging its Union dues deduction and remittance procedure.

j. Unilaterally changing pay periods from weekly to biweekly.

k. Failing and refusing to provide, and unreasonably delaying the provision of, information requested by the Union, which was relevant to its representational duties.

7. The unfair labor practices set forth above affect commerce within the meaning of §2(6) and (7) of the Act.

REMEDY

Having found that ADT committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the Act's policies.

Regarding Whittington, it must make him whole for any losses of earnings and other benefits. His make whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), that is compounded daily as set forth in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Under *King Soopers, Inc.*, 364 NLRB No. 93 (2016), it shall also compensate him for search-for-work and interim employment expenses, regardless of whether those expenses exceed his interim earnings.[57]

In light of ADT's withdrawal of recognition and refusal to bargain with the Union, it must recognize and bargain with the Union for a reasonable period of time as the bargaining representative of Unit employees. An affirmative bargaining order is a reasonable exercise of the Board's broad discretionary remedial authority. *Caterair International*, 322 NLRB 64, 64–68 (1996). As the Board stated in *Anderson Lumber*, 360 NLRB 538 (2014), "We adhere to the view that an affirmative bargaining order is 'the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.'" Id., slip op. at 1, quoting *Caterair*, supra, 322 NLRB at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738-739 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997). In *Vincent*, supra at 738, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' §7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." In the instant case, a balancing of the three factors warrants an affirmative bargaining order. ***First***, an affirmative bargaining order in this case vindicates the §7 rights of the Unit employees who were denied the benefits of collective bargaining through their designated representative by ADT's withdrawal of recognition and resultant refusal to bargain with the Union. *Second*, an affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. It removes ADT's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the possibility of a decertification petition or by the prospect of an imminent withdrawal of

[57] Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate set in *New Horizons*, supra, compounded daily under *Kentucky River Medical Center*, supra.

recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and the issuance of a cease-and-desist order. *Third*, a cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy ADT's withdrawal of recognition and refusal to bargain with the Union because it would permit another challenge to the Union's majority status before the taint of the Respondent's previous unlawful withdrawal of recognition has dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be particularly unjust in light of the fact that the litigation of the Union's charges took several years and, as a result, the Union needs to reestablish its representative status with unit employees (i.e., the unlawfully excluded new hires and accreted workers that the Union has had little or no contact with). Further, ADT's withdrawal of recognition would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. In these circumstances, permitting a decertification petition to be filed immediately might very well allow ADT to profit from its own unlawful conduct. In sum, these circumstances greatly outweigh the temporary impact the affirmative bargaining order might have on the rights of employees who oppose continued union representation. An affirmative bargaining order with its temporary decertification bar is, therefore, necessary to fully remedy the violations in this case. In addition, ADT must commence bargaining, upon request, with the Union as the exclusive collective-bargaining representative of employees in an appropriate bargaining unit, and embody any understanding reached in a signed agreement.

Regarding ADT's failure to place employees in the unit, including its failure to properly accrete workers into the unit as described above, it shall make those employees make whole for any loss of wages or other benefits suffered as a result in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd.444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra.

Regarding the several unilateral changes at issue herein, which included changes to ADT's sick leave, lunch, PTO, bereavement leave, sales quota and compensation, grievance procedure, dues deduction, and pay period policies, it shall, on request of the Union,[58] retroactively restore any unilaterally modified terms and conditions of employment, and rescind the unilateral changes it has made, until such time as ADT and the Union reach an agreement for a new collective-bargaining agreement, or a lawful impasse based on good-faith negotiations.

Regarding ADT's failure to provide relevant requested information to the Union, it shall provide such information to the extent that it has not already done so. ADT shall also post the attached notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[59]

ORDER

ADT, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Inviting employees to resign in response to their activities on behalf of the Union or exercise of other protected concerted activities.

(b) Threatening employees that wage raises would be withheld in an effort to discourage their support for the Union.

(c) Discharging or otherwise discriminating against employees because they engage in Union and other protected concerted activities.

(d) Withdrawing recognition from the Union and failing and refusing to bargain with it as the exclusive collective-bargaining representative of its Unit employees.

(e) Refusing to recognize the Union as the collective-bargaining representative of newly hired servicemen and other accreted servicemen and failing to include such employees in the Unit.

(f) Changing wages, benefits, or other terms and conditions of employment of its Unit employees without first notifying the Union and giving it an opportunity to bargain.

(g) Refusing to bargain collectively with the Union by failing and refusing to furnish it with, or delaying the provision of, requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of its Unit employees.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Whittington full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Whittington whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the *Remedy* section of the decision, compensate him for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar year.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to Whittington's unlawful discharge, and within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due

[58] To the extent that these changes have improved Unit terms and conditions of employment, the recommended Order below shall not be construed as requiring rescission of such improvements, unless requested by the Union.

[59] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

under the terms of the Board's Order.

(e) Recognize and, upon request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit, which includes newly-hired and accreted servicemen, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> [A]ll servicemen employed by the Employer at its facilities located in Dallas and Fort Worth, Texas; excluding operators, office clerical employees, salesmen, confidential employees, alarm service investigators, supervisors, relief service supervisors and guards as defined in Act.

(f) Recognize the Union as the collective-bargaining representative of newly hired servicemen and accreted servicemen, and include such employees in the Unit.

(g) On request by the Union, rescind the changes to its Unit employees' terms and conditions of employment that were unilaterally implemented since May 2016.

(h) Make whole all newly hired Unit employees, including accreted employees, in the manner set forth in the *Remedy* section of the Decision, for losses caused by its failure to include them in the Unit and apply the Unit's terms and conditions of employment.

(i) Make whole Unit employees, in the manner set forth in the *Remedy* section of the Decision, for losses caused by the several unilateral changes at issue herein.

(j) Furnish to the Union in a timely manner the information it has requested since October 2014, unless it has already done so.

(k) Within 14 days after service by Region 16, post at its several DFW offices and facilities copies of the attached notice marked "Appendix."[60] Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since September 1, 2014.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Dated Washington, D.C., November 16, 2018.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT invite you to quit in response to your activities on behalf of the Communication Workers of America, AFL-CIO (the Union) or your exercise of other protected concerted activities.

WE WILL NOT threaten that wage raises would be withheld in an effort to discourage your support for the Union.

WE WILL NOT fire you or otherwise discriminate against you because you engaged in Union or other protected concerted activities.

WE WILL NOT withdraw recognition from, and fail and refuse to recognize and bargain with, the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT refuse to recognize the Union as the collective-bargaining representative of newly hired servicemen and other accreted servicemen, and fail to include these employees in the bargaining unit.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to its performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT change your wages, benefits, or other terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Whittington whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Whittington, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any way.

WE WILL compensate Whittington for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE

[60] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WILL file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report assigning his backpay awards to the appropriate calendar year.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> [A]ll servicemen employed by the Employer at its facilities located in Dallas and Fort Worth, Texas; excluding operators, office clerical employees, salesmen, confidential employees, alarm service investigators, supervisors, relief service supervisors and guards as defined in Act.

WE WILL recognize the Union as the collective-bargaining representative of newly hired servicemen and accreted former Brinks servicemen and include such employees in the Unit.

WE WILL, on request by the Union, rescind the changes in bargaining unit employees' terms and conditions of employment that were unilaterally implemented since May 2016.

WE WILL make whole all newly hired bargaining unit employees, including accreted former Brinks employees for losses caused by our failure to include them in the bargaining unit and apply the unit's terms and conditions of employment.

WE WILL make whole bargaining unit employees for losses caused by our several unilateral changes.

WE WILL furnish to the Union in a timely manner the information requested since October 2014, unless we have already done so.

ADT, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-144548 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.